Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1823

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT S. GREENSPAN
BRUCE N. BAGNI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether "prevailing rate" federal employees in October 1978 were entitled to wage increases suggested by wage surveys despite legislation, mandating smaller increases, that was enacted after the effective date of any increases paid pursuant to the surveys but before such increases were ordered.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

National Federation of Federal Employees, Local 1622 v. *Brown*, 645 F. 2d 1017 7

United States v. *Dickerson*, 310 U.S. 554 5

United States v. *Larionoff*, 431 U.S. 864 ..... 6, 7, 8

United States v. *Will*, No. 79-983 (Dec. 15, 1980) 5, 7, 8

Constitution and statutes:

United States Constitution, Article III (Compensation Clause) 7

Act of Sept. 2, 1978, Pub. L. No. 85-872, 72 Stat. 1696 6

Civil Service Reform Act of 1978, Pub. L. No. 95-454, Section 906(a)(2) and (3), 92 Stat. 1224 2

Treasury, Postal Service, and General Government Appropriations Act of 1979, Pub. L. No. 95-429, 92 Stat. 1001 3

Section 614(a), 92 Stat. 1018 4

Page

Constitution and statutes—Continued:

5 U.S.C. (& Supp. III) 5341-5349 1
5 U.S.C. 5341 7
5 U.S.C. (& Supp. III) 5343 ..... 2, 3
5 U.S.C. (& Supp. III) 5343(a) 7
5 U.S.C. (& Supp. III) 5343(a)(2) 2
5 U.S.C. (& Supp. III) 5343(a)(3) 2, 7
5 U.S.C. (& Supp. III) 5343(a)(4) 2
5 U.S.C. 5344 ..... 2, 4, 5, 7, 8
5 U.S.C. 5344(a) 2, 3, 5, 6
5 U.S.C. 5344(b) 2, 6
5 U.S.C. 5344(b)(1) 3, 6
5 U.S.C. 5344(b)(2) 3, 6

Miscellaneous:

H.R. Conf. Rep. No. 95-1673, 95th Cong., 2d Sess. (1978) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1823

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. The opinion of the district court (Pet. App. 17a-23a) is reported at 474 F. Supp. 357.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1980, and a petition for rehearing was denied on February 6, 1981 (Pet. App. 15a). The petition for a writ of certiorari was filed on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are federal blue-collar workers whose wage increases are determined by the "prevailing rate" system set forth in 5 U.S.C. (& Supp. III) 5341-5349, and unions who represent such employees (Pet. App. 3a). Under

5 U.S.C. (& Supp. III) 5343, "[t]he pay of [these] employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates." Section 5343 also prescribes a scheme to be used in determining prevailing rates. First, a "lead agency" designated by the Office of Personnel Management[1] conducts a "wage survey[]" in each geographical area (5 U.S.C. (& Supp. III) 5343(a)(3)). As the court of appeals noted (Pet. App. 3a-4a), "[t]he wage surveys are intended to aid the Government in keeping wages for federal employees roughly in line with wages paid to comparably classified employees in the private sector." The lead agency then must "analyze wage survey data, and develop and establish appropriate wage schedules and rates" for its "prevailing rate" employees (5 U.S.C. (& Supp. III) 5343(a)(3)). Other agencies "shall apply * * * the wage schedules and rates established by the lead agency" to their employees (5 U.S.C. (& Supp. III) 5343(a)(4)).

Petitioners' claim is based principally on 5 U.S.C. 5344, which provides, in part:

> (a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day * * * following the date the wage survey is ordered to be made.
>
> (b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when—

---

[1]See 5 U.S.C. (& Supp. III) 5343(a)(2). At the time of the events involved in this case, this and other functions now assigned to the Office of Personnel Management were performed by the Civil Service Commission. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, Section 906(a)(2) and (3), 92 Stat. 1224.

> (1) the individual is in the service of the Government of the United States * * * on the date of the issuance of the order granting the increase; or
>
> (2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase * * *.

2. The lead agencies in the areas where petitioners worked conducted wage surveys in July 1978. These surveys suggested wage increases of between 7% and 12%. Under Section 5344(a), any increases granted pursuant to these surveys were to become effective on either October 1 or October 8, 1978, depending on the area (Pet. App. 4a). While the surveys were being conducted, however, Congress was considering an appropriations bill imposing a 5.5% limit on blue-collar workers' wage increases (*id.* at 5a). The bill was reported out of conference committee on September 29, 1978 (H.R. Conf. Rep. No. 95-1673, 95th Cong., 2d Sess. (1978)) and was approved by the House and Senate on October 4 (Pet. App. 5a). The President signed the bill into law on October 10. Treasury, Postal Service, and General Government Appropriations Act of 1979 ("Appropriations Act"), Pub. L. No. 95-429, 92 Stat. 1001. In anticipation of this bill, none of the agencies employing petitioners had yet determined the wage increases to be given under Section 5343 (Pet. App. 5a). On October 20, the agencies, in compliance with a Civil Service Commission Bulletin, issued wage schedules granting increases of 5.5%. These increases were paid retroactively to the "effective dates" of October 1 or October 8 (*id.* at 5a-6a).

Petitioners sued in the United States District Court for the District of Columbia, seeking to establish that they were entitled to be paid, from the "effective dates" of either October 1 or October 8, the wage increases suggested by the surveys (Pet. App. 6a). The district court held that petitioners

were entitled to "the full amount of the survey determined wage increases" only for the period between the effective dates and October 10 (*id.* at 22a). The court determined that "[t]he 5.5% ceiling applies to all services performed on or after the effective date of the pay cap legislation, October 10, 1978" (*id.* at 23a).

Both sides appealed. The court of appeals ruled against petitioners on all issues, concluding that they were entitled to no more than a 5.5% increase (Pet. App. 6a, 14a). The court held that the Appropriations Act had "effectively modified the prevailing rate statute to provide that wages for prevailing rate employees could not be increased by more than 5.5% for fiscal year 1979" (*id.* at 9a). The court further held that the Appropriations Act could constitutionally limit wages in this manner because petitioners "acquire[d] a vested right to an actual wage increase only when the agency issue[d] an order fixing the increase" (*id.* at 13a-14a). The court agreed that Section 5344 required that any wage increase be made retroactive to the "effective date" but refused to give petitioners an "entitlement to an undetermined raise on the effective date" (*id.* at 11a-12a).

ARGUMENT

1. Petitioners' "main contention" (Pet. 15) is that the Appropriations Act was not intended to alter the wage increases petitioners would have received under the prevailing rate statutes. This contention is without merit. Section 614(a) of the Appropriations Act provides, in pertinent part (92 Stat. 1018):

> No part of any of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act, may be used to pay the salary or pay of any individual in any office or position in an amount which exceeds the rate of salary or basic pay payable for such office or position on September 30, 1978, by

more than 5.5 percent, as a result of any adjustments which take effect during such fiscal year under—

* * * * *

(3) section 5343 of title 5, United States Code, if such adjustment is granted pursuant to a wage survey (but only with respect to prevailing rate employees * * *).

Petitioners acknowledge, of course, that the fiscal year ending September 30, 1979, began on October 1, 1978 (Pet. 17). Thus Congress plainly expressed its intention not to pay petitioners a wage increase greater than 5.5% at any time after October 1. Petitioners argue at length (Pet. 15-17) that repeals by implication are not favored and that appropriations statutes, in particular, should not be interpreted to override substantive legislation. But whether or not the Appropriations Act is characterized as a repeal or modification of another statute, there is no doubt that if Congress is sufficiently explicit in modifying other laws it may "accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). See *United States* v. *Will*, No. 79-983 (Dec. 15, 1980), slip op. 20-21 & n.23. Here, as the court of appeals observed (Pet. App. 9a), the congressional intent to limit petitioners' wage increase could not have been more clearly stated.

2. Petitioners also argue (Pet. 14, 19) that under 5 U.S.C. 5344 the wage increases suggested by the wage surveys vested on the effective dates and, accordingly, that the government was constitutionally compelled to pay those increases. Petitioners appear to contend that Section 5344(a) required the agencies to grant the increases on the effective dates (see Pet. 12); once granted, petitioners assert, the increases could not be rescinded. But petitioners' interpretation of Section 5344(a) is entirely inconsistent with

Section 5344(b).[2] Section 5344(b) explicitly contemplates that an "order granting the [wage] increase" will be entered at some point *after* the effective date specified in Section 5344(a); it refers to "the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase" (5 U.S.C. 5344(b)(2)). Thus petitioners' suggestion that the increase must be ordered on the effective date is plainly wrong. Moreover, Section 5344(b) provides that an increase will be given, retroactive to the effective date, only to employees who are employed by the government on the date of the order granting the increase or who have retired or died between the effective date and the date of the order. Employees who have quit or been discharged do not receive retroactive increases. This again shows that Congress did not intend Section 5344(a) to "vest" employees with an increase on the effective date.[3]

Petitioners' reliance on *United States* v. *Larionoff*, 431 U.S. 864 (1977), is misplaced.[4] In *Larionoff*, Congress

---

[2]Subsections (a) and (b) of Section 5344 were enacted together. See Act of Sept. 2, 1978, Pub. L. No. 85-872, 72 Stat. 1696.

[3]Petitioners cite legislative history (Pet. 11-12) suggesting that the purpose of Section 5344(a) is to prevent agencies from undermining Congress' intention to increase wages by delaying the increases. But this purpose is accomplished so long as the increases, when granted, are made retroactive to the effective date; here, the 5.5% increase granted to petitioners was made retroactive to the effective dates (Pet. App. 6a). In a related vein, petitioners contend (Pet. 13-14) that the court of appeals' decision will enable agencies to delay orders granting wage increases indefinitely. The delay here, however—between October 8 or 10 and October 20—was surely not indefinite or unreasonable, and the language of Section 5344(b) makes plain that Congress intended to permit some delay between the effective date and the date of the order granting the increase.

[4]*Larionoff*, in any event, turned on the interpretation of the statutes involved in that case and did not reach any constitutional issues. See 431 U.S. at 879. By the same token, the court below expressly limited its holding to "the construction of the particular terms of the prevailing rate statute" (Pet. App. 12a n.14).

granted a specific bonus, payable in the future, for what this Court called the "crystal clear" purpose (431 U.S. at 873) of inducing servicemen to reenlist. Because the bonus could not serve this purpose unless "the service member could count on receiving it if he elected to remain in the service" (*id.* at 876), the Court concluded that a subsequent statute, which did not refer to the bonus program, was not intended to rescind it by implication (*id.* at 879-882). Petitioners' claim is distinguishable on each of these points.

First, Section 5344 does not confer any specific benefit. The wage surveys do not dictate a certain increase; the lead agency must "analyze" the survey data and "develop and establish appropriate wage schedules and rates" (5 U.S.C. (& Supp. III) 5343(a)(3)). More important, employees are to receive prevailing rate increases only "as nearly as is consistent with the public interest" (5 U.S.C. (& Supp. III) 5343(a); see 5 U.S.C. 5341). Thus, until petitioners' increases were granted, they did not know what increase they would receive or, perhaps, even whether they would receive any increase at all.[5]

---

[5]The District of Columbia Circuit construed the "public interest" criterion in *National Federation of Federal Employees, Local 1622* v. *Brown*, 645 F. 2d 1017 (1981) (Pet. App. 26a-48a). There, the same panel that decided the present case held, by a divided vote, that the "public interest" qualification in Section 5343(a) permits agencies only to apply the principles set forth in 5 U.S.C. 5341 and does not grant general discretion to modify the wages suggested by the survey. We disagree with the court of appeals' decision in *Brown*, but because the action taken by the government in that case could be justified under the court of appeals' construction of the "public interest" criterion (see Pet. App. 40a, 41a-42a), we did not seek further review. As the court below clearly held (Pet. App. 13a), even under this narrow construction petitioners' expectations could not have been sufficiently definite to create a constitutionally-protected interest in a specific wage increase.

The statutory scheme involved in *United States* v. *Will, supra*, is also distinguishable. There, the pay cap statutes held unconstitutional were enacted *after* the pay raise had already been ordered into effect and the higher rate had been paid. Slip op. 23, 29. Moreover, the Court in that case was concerned with the particular protections accorded judicial salaries by the Compensation Clause of Article III of the Constitution.

Second, unlike the bonus program considered in *Larionoff*, Section 5344 was not specifically designed to induce employees to continue in government service. Of course, any statute prescribing future wage increases—indeed, perhaps any statute affecting conditions of employment in the government—is partly intended to attract or retain government employees. But it is wholly implausible to suggest that the Constitution forbids Congress from ever modifying any such statute in a way unfavorable to the employees. See *United States* v. *Larionoff, supra*, 431 U.S. at 879. Thus, at least in the absence of a "specific[] * * * promise" (*id.* at 878) by Congress reflecting a clear intention (*id.* at 873) to induce employees to give or offer certain services, a statute prescribing wage increases is merely "an announced future intent" (*United States* v. *Will, supra*, slip op. 27) that is not enforceable in court.

Here, as petitioners themselves demonstrate (Pet. 10-12; see note 3, *supra*) and the court of appeals recognized (Pet. App. 11a-12a), Section 5344 was intended to remove agencies' incentive to delay wage increases. Petitioners point to no legislative history at all—let alone a "crystal clear" demonstration of congressional intent—suggesting that Section 5344 was designed to promise employees a wage increase and cannot achieve its purposes unless employees can "count on receiving" (431 U.S. at 876) the increase.[6]

---

[6]In addition, the petition does not allege that at any point petitioners relied on the prospect of a certain wage increase in deciding to remain in government service. See *United States* v. *Larionoff, supra*, 431 U.S. at 867 n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT S. GREENSPAN
BRUCE N. BAGNI
Attorneys

JULY 1981

DOJ-1981-07